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82-316

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

A.V. COSTANTINI,
dba UNITED TRAVEL SERVICE,
dba WARDS TRAVEL SERVICE,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

A.V. COSTANTINI
565 John Daly Blvd.
Daly City, Ca 94015
(415) 991-4907

In Propria Persona

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board erred in not requiring compliance with its previously issued orders.

2. Whether the Civil Aeronautics Board erred in not protecting the public interest.

3. Whether the Civil Aeronautics Board erred in allowing an airline to file false statements.

4. Whether the Civil Aeronautics Board erred in not requiring compliance with Board's Rules of Practice.

5. Whether the Civil Aeronautics Board erred in not providing a hearing to resolve disputed issues.

6. Whether the Civil Aeronautics Board erred in issuing an order based upon findings without support in the evidence.

7. Whether the Court of Appeals erred in overlooking the facts and applicable law, and failed to provide a trial de novo.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

A.V. COSTANTINI,
dba UNITED TRAVEL SERVICE,
dba WARDS TRAVEL SERVICE,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

A.V. Costantini, complainant and petitioner in the proceedings below, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

1 Order of the United States Court of Appeals for the Ninth Circuit dated May 25, 1982 denying Petitioner's Motion for Rehearing (Appendix at B1).

2. Order of the United States Court of Appeals for the Ninth Circuit dated April 7, 1982 affirming the dismissal by the Civil Aeronautics Board of three com - plaints filed by Petitioner. 679 F.2d (table) 896 (Appendix at A1).

3. Order No. 80-11-10 of the Civil Aeronautics Board adopted November 3, 1980 affirming the dismissal by the Civil Aeronautics Board's Director of Bureau of Consumer Protection of three complaints filed by Petitioner (Appendix at C1).

4. Order No. 80-6-21 of the Civil Aeronautics Board issued June 4, 1980 by the Director of the Civil Aeronautics Board's Bureau of Consumer Protection (Appendix at D1).

JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1982 (Appendix at A1). A timely petition for rehearing was denied on May 25, 1982 (Appendix at B1). This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

5 U.S.C. Section 554 (Appendix at E1)

5 U.S.C. Section 706 (Appendix at F1)

49 U.S.C. Section 1302 (Appendix at G1)

49 U.S.C. Section 1472 (Appendix at H1)

49 U.S.C. Section 1482 (Appendix at I1)

49 U.S.C. Section 1485 (Appendix at J1)

14 C.F.R. Section 302.204 (Appendix at K1)

14 C.F.R. Section 302.207 (Appendix at L1)

14 C.F.R. Section 302.208 (Appendix at M1)

STATEMENT

A. The Facts

A.V. Costantini (Dr. Costantini) entered the travel agency business in 1963 and during the ensuing decade opened many branch offices including the establishment of branches in the Montgomery Ward Stores.

In order to be able to provide airline tickets to clients, each travel office required separate approval by the Air Transport Association of America (ATC) and by the International Air Transport Association (IATA). ATC and IATA required certification that the ownership of the branch office was the same as that of the home office.

Pursuant to the provisions of Civil Aeronautics Board Orders No. E-14012 and No. E-16459, ATC and IATA are required to record and give notice to applicants the reasons for not approving branch offices.

The expansion into the 475 nationwide Montgomery Ward Stores was thwarted by ATC claiming that office managers lacked experience. IATA failed to provide any reasons what-so-ever as to why it was refusing to approve additional branch offices in the various Montgomery Ward Stores. As a result of ATC and IATA refusal to approve these new offices, the license agreement with Montgomery Wards Stores was lost.

The conflict was aggravated when a Trans World Airline (TWA) representative informed one of Dr. Costantini's branch office managers that ATC was never going to approve any of the newly opened offices. As TWA's legally appointed agent, Dr. Costantini wrote to the TWA Chairman of the the Board demanding that TWA provide any information which it had in its possession upon which TWA knew that ATC would never approve any of the Montgomery Ward Store offices. TWA's response was that ATC was

not approving future offices because Dr. Costantini had been charged with selling illegal airline tickets and that the new offices lacked experienced managers. Dr. Costantini has never sold illegal airline tickets nor has he ever been charged for having done so.

As TWA's agent, Dr. Costantini relied upon TWA's representation that any information that TWA had in its possession had been released to him. There was no rational reason to suspect that TWA, as Dr. Costantini's principal, would falsify its representations being made to him. Even if suspicion were to have existed, it would have been dispelled by the fact that documents obtained from ATC, as a part of discovery proceedures relevant to ATC's refisal to approve the Montgomery Ward Store locations, failed to include the key documents upon which this dispute is based.

What TWA, ATC and IATA had failed to inform Dr. Costantini was that the TWA had written to the Civil Aeronautics Board, to ATC and to IATA that Dr. Costantini was not the true owner of his branch offices and that these offices were actually improper franchises which were owned by the branch office manager:

> "the fact that he has been requesting approval of his agency locations as branches..but is reported to be selling the branches as franchises and a percentage of the gross profit."

Dr. Costantini has never sold his branch offices as franchises and the ownership of his branches was at all times the same as that of the parent office.

ATC made the same falsification before the Antitrust Division of the United States Department of Justice thereby terminating its investigation into Dr. Costantini's complaint that ATC's activities constitut-

ed antitrust violations.

As the result of TWA's false repre-entations, Dr. Costantini was effectively prevented from expanding into the 475 Montgomery Ward Stores nationwide. The fact that TWA is also a direct competitor with Dr. Costantini in the sale of air transportation, package tours and related travel services cannot be overlooked. The fact that TWA's false representation to the Civil Aeronautics Board, which was subsequently passed on to the Department of Justice, played a key role in thwarting governmental investigation of ATC and TWA cannot be overlooked. The fact that TWA violated the law by filing false information before the Civil Aeronautics Board cannot be overlooked. The fact that ATC and IATA violated the Civil Aeronautics Board's orders in not providing Dr. Costantini with the true resons why the Montgomery Ward Store locations were not

being approved cannot be overlooked.

If Dr. Costantini had not exercised his rights under the Freedom of Information Act, none of the above-described fraud would have ever been discovered.

B. Proceedings Below

Following the discovery of the existence of fraudulently concealed falsifications having been made by TWA, ATC and IATA, Dr. Costantini excercised his right under the provisions of 49 U.S.C. Section 1482 and filed three complaints before the Civil Aeronautics Board.

In Docket 37917 (Costantini v. TWA), petitioner alleged and documented that TWA had violated the Federal Aviation Act by placing false information before the Civil Aeronautics Board.

In Docket 38211 (Costantini v. ATC), ATC), petitioner alleged and documented that ATC had violated CAB Order No. E-

14012, issued June 10, 1959.

In Docket 38233, (costantini v. IATA), petitioner alleged and documented that IATA had violated CAB Order No. E-16459, issued March 1, 1961.

TWA responded to the complaint by stating that it was without knowledge to nearly all of the allegations and that it denied it had made secretive and false representations and statements.

ATC and IATA defaulted by failing to file any response to petitioner's complaints against them.

On June 4, 1980. the Director of the Civil Aeronautics Board's Bureau of Consumer Protection, acting under delegated authority, issued Order 80-6-21 dismissing, without conducting an investigation, all of petitioner's complaints against TWA, ATC and IATA. (Appendix at D1)

On June 30, 1980, petitioner filed his request for Civil Aeronautics Board review

of Order 80-6-21. On November 3, 1980, without a notice of hearing and without a hearing, said Board adopted Order 80-11-10 dismissing all of petitioner's complaints against TWA, ATC and IATA (Appendix at C1).

On December 29, 1980, petitioner petitioned the United States Court of Appeals for the Ninth Circuit for review of the Civil Aeronautics Board's orders. On April 7, 1982, the Court of Appeals affirmed the order of the Civil Aeronautics Board (Appendix at A1).

On April 20, 1982, petitioner requested a rehearing before the Court of Appeals. On May 25, 1982, the petition for rehearing was denied (Appendix at B1).

REASONS FOR GRANTING WRIT

I THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE SET OUT IN THE ATLANTIC COAST LINE CASE IN THIS COURT, THAT AGENCY ORDERS MUST BE OBEYED

In the proceedings below, the mandate of 49 U.S.C. Section 1485(e) was ignored:

> "It shall be the duty of every person subject to this Act... to observe and comply with any order...issued by...the Board under this Act affecting such person so long as the same shall remain in effect."

The decision below is in conflict with the applicable decision of this Court. Atlantic Coast Line R. Co. v. Florida, 295 U.S. 301, reh den 295 U.S. 769. This court held that valid administrative orders must be obeyed by all parties governed thereby.

The facts are that ATC violated CAB Order No. E-14012 and IATA violated CAB Order E-16459 when they failed to provide petitioner with the reasons why they would

not approve his Montgomery Ward locations. The proceedings below have entirely ignored these facts with the result being that ATC and IATA have not only violated these CAB orders but now enjoy both agency and judicial approval of their illegal acts.

II THE DECISION BELOW CONFLICTS WITH THE PRINCIPLES SET OUT IN THE SIERRA CLUB CASE. AND OTHER CASES IN THIS COURT, THAT PETITIONER HAS A RIGHT TO ADMINISTRATIVE ACTION AS A REPESENTATIVE OF THE PUBLIC INTEREST

The proceedings below ignored the public interest standard which is applicable in this case and completely ignored petitioner's allegations and supporting argument that this case involved the public interest.

It is settled law that an agency's primary purpose is to protect the public interest. United States v. Abilene & S.R. Co., 265 U.S. 274.

In Pan Am Airways v. United States, 371 U.S. 296, this Court defined public interest in the context of the particular regulatory responsibilities as clearly stated in 49 U.S.C. Section 1302:

> "..the Board shall consider the following, among other things, as being in the public interest.. (c) the promotion of adequate, economical, and effecient service by air carriers at reasonable charges, without undue discriminations, undue preferences or advantages, or unfair or destructive practices;" 1/

There can be no question that the actions of TWA, ATC and IATA constituted unfair and destructive practices when the result was the destruction of petitioner's plan to establish 475 travel agency locations in the Montgomery Ward Stores. The nature of the proceedings below results in undue preference and advantage for TWA, ATC and IATA at the expense of petitioner.

1/ 49 U.S.C. 1302(c) has since been replaced by 1302(a)(3) but the new language does not appear to alter the public interest standard.

The reviewing court's decision is in conflict with the appellate court's decision in Civil Aeronautics Board v. Carefree Travel, Inc. 513 F.2d 375, where the Board's position that public interest predominates on the side of enforcing the law was upheld. In the instant case the proceedings below have the effect of protecting criminal activity.

The decision below is also in conflict with applicable decisions of this Court. When a person establishes that he has a standing to seek judicial review of the action because of particularized injury to him, he may argue the public interest as a "representative of the public interest" as a "private attorney general", so that he may contest not only the action which injures him but the entire complex of actions of which his injury-inducing action is a part. Sierra Club v. Morton, 405 U.S. 727; Scripps How-

ard Radio v. FCC, 316 U.S. 4; FCC v. Sanders Brothers Radio Station, 309 U.S. 470.

III AN IMPORTANT QUESTION OF FEDERAL LAW HAS DEEN DECIDED BY A FEDERAL COURT OF APPEALS WHICH HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT

The fact is that TWA filed false statements before the Civil Aeronautics Board regarding the petitioner. 49 U.S.C. Section 1472(e) provides that no carrier:

> "shall knowingly and willfully file any false report...or memorandum..."

The proceedings below have the effect of making legal what is by statute illegal. An important question of federal law has been decided by the Court of Appeals; a question which has not been, but should be decided by this Court.

IV THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE SET OUT IN THE VITARELLI CASE, AND OTHER CASES IN THIS COURT, THAT AGENCY ACTION MUST CONFORM TO THE RULES

To be valid, the action of an agency must conform to the rules, particularly those designed to provide procedural safeguards for fundamental rights. Vitarelli v. Seaton, 359 U.S. 535; Service v. Dulles, 354 U.S. 363: Bridges v. Wixon, 326 U.S. 135. The proceedings before the Civil Aeronautics Board were not conducted in accordance with the Board's Rules of Practice. 14 C.F.R. 302.207(b) provides:

> "Allegations of fact not denied or contraverted shall be deemed admitted." 2/

The failure of ATC and IATA to file an answer denying or contraverting the allegations that they had violated Board orders admits petitioner's allegations. The proceedings below ignore this reality.

2/ 14 C.F.R. 302.207(b) is applicable to the conduct of Third-Party Complaints as set forth in 14 C.F.R. 302.204(b)

14 C.F.R. 302.208 further provides:

> "Failure of a respondent to file and serve an answer...shall be deemed to authorize the Board, in its discretion, to find the facts alleged in the petition to be true and to enter such order as may be appropriate without notice or hearing, or, in its discretion, to proceed to take proof, without notice, of the allegations or charges set forth in the complaint.."

The Board is not authorized to dismiss a Third Party Complaint when default has occured.

Clearly, the agency action was without observation of procedure required by law and, as provided in 5 U.S.C. Section 706 (2)(D), the reviewing court shall hold unlawful and set aside such agency action.

V THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE SET OUT IN THIS SAME CIRCUIT, THAT AN EVIDENTIARY HEARING IS REQUIRED AS A BASIS FOR DETERMINING ADJUDICATORY FACTS

Petitioner has alleged and documented that TWA has violated the Federal Aviation Act by placing false information before the Civil Aeronautics Board; that ATC and IATA have violated the Federal Aviation Act by violating Board orders. Based upon these facts, an investigation and hearing are mandated by 49 U.S.C. Section 1482:

> "If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the...Board to investigate the matters complained of."

The proceedings below have entirely ignored the provisions of 49 U.S.C. Section 1482. Petitioner's complaints were filed under the provisions of 49 U.S.C. Section 1482 and none of the proceedings below have have appropriately addressed

this reality. In fact, the administrative and judicial determinations below were made on the basis of complaints filed under Section 411 of the Federal Aviation Act, 49 U.S.C. Section 1381. Petitioner made this more than clear when he amended his original complaints and continued to stress this point throughout the proceedings without benefit of response either at the agency level or the judicial level including his request for a rehearing. The decisions below have been made as if 49 U.S.C. Section 1482 doesn't exist. But it does exist and petitioner claims his right to have filed his complaints pursuant to the provisions thereof.

In Marshall v. Sawyer, 365 F.2d 105, the Ninth Circuit stated:

> "Procedural due process requires that when, as a premise for administrative action, an agency of government makes a determination of adjudicatory facts, one who has a sufficient interest or right at stake shall be afforded an evidentiary hearing..."

The reviewing court also ignored the mandate of the Administrative Procedure Act, 5 U.S.C. Section 554(c)(2) which states:

> "The agency shall give all interested parties opportunity for-
>
> (2) to the extent that the parties are unable to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title"

VI THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE SET OUT IN RALADAM CASE, AND OTHER CASES IN THIS COURT, THAT AN ORDER ISSUED WITHOUT SUPPORT IN EVIDENCE IS BEYOND THE POWER AND JURISDICTION OF AGENCIES

The record in the case below is unique in that the entire evidenciary record consists only of petitioner's documentary evidence submitted as proof of the allegations against TWA, ATC and IATA. Those documents constitute the only findings of fact which the record below contains and therefore are the only findings of fact

upon which the Civil Aeronautics Board's order should have been based.

49 U.S.C. Section 1485(f) mandates that the Civil Aeronautics Board shall set forth the findings of fact upon which its order is based. An order issued without support in evidence is beyond the power and jurisdiction of agencies. Federal Trade Commission v. Ralmadam, 283 U.S. 643; United States v. Abilene & S.R. Co., 265 U.S. 274; Interstate Commerce Commission v. Louisville & N.R. Co. 227 U.S. 88.

Ignoring petitioner's evidence violated the rudiments of fair play. West Ohio Gas Co. v. Public Utilities Commission, 294 U.S. 79.

VII THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE SET OUT IN OVERTON PARK CASE, THAT THE FACTS ARE SUBJECT TO TRIAL DE NOVO WHEN AGENCY ACTION IS UNWARRENTED BY THE FACTS

5 U.S.C. Section 706(2)(E) mandates that the facts are subject to trial de

action is unwarranted by the facts. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402.

The only facts in the record below are the facts that TWA placed false statements before the Civil Aeronautics Board and that ATC and IATA have violated Civil Aeronautics Board orders.

The proceedings below have ignored the petitioner's statutory right to have the facts subject to a trial de novo by the United States Court of Appeals.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

A.V. Costantini
In Propria Persona
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August 20, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

A.V. COSTANTINI, d/b/a UNITED TRAVEL SERVICE, Petitioner, vs. CIVIL AERONAUTICS BOARD, Respondent Respondent.	No. 80-7754 MEMORANDUM Filed April 7, 1982

Petition for Review of an Order of the Civil Aeronautics Board
Argued and submitted October 15, 1981

Before: Wallace and Pregerson, Circuit Judges, and Byrne, District Judge.*

Costantini petitions this court, pursuant to 49 U.S.C. Section 1486, to review Order No. 80-11-10 of the Civil Aeronautics Board ("CAB"), adopted November 3, 1980. That order affirmed the dismisal,

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* Honorable William Matthew Byrne, Jr., United States District Judge for the Central District of California sitting by designation.

by the Director of the CAB's Bureau of Consumer Protection, of three complaints Costantini had filed with the CAB in May 1980. Costantini's complaints alleged various violations of section 411 of the Federal Aviation Act, 49 U.S.C. Section 1381.

Section 411 authorizes the CAB to investigate third-party allegations of "unfair or deceptive practices or unfair methods of competition" in the air transportation industry "if it considers that such action by it would be in the interest of the public" (emphasis added). Thus, "the Board's jurisdiction to initiate an investigation under Section 411 is premised on a finding that the 'public interest' is involved." Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 302 (1976).

Here, however, the CAB determined that an investigation of the allegations in Costantini's complaints would not be in the public interest. We do not conduct an

independent investigation to see whether the CAB's determination was correct, we ask only whether "the Board has stayed within its jurisdiction and applied criteria appropriate to that determination." American Airlines, Inc. v. North American Airlines, Inc., 351 U.S. 79, 85 (1956). The criteria on which the CAB based its determination here are: (1) petitioner's disputes are essentailly private; (2) they have already been the subject of several prior(and fruitless) judicial and administrative proceedings; and (3) any need for a broad inquiry into the travel agency business is satisfied by the CAB's ongoing review of the entire marketing structure of air transportation. These criteria are entirely appropriate. The CAB did not abuse its discretion in dismissing petitioner's complaints. See REA Express, Inc. v. CAB, 507 F.2d 42, 45 (2nd Cir. 1974).

Furthermore, we have examined, and we

reject, petitioner's contentions that errors by the CAB mandate reversal of its order. In Particular, the CAB did nothing improper in considering judicial and administrative dispositions of petitioner's previous complaints, nor did it rely on the doctrine of res judicata. Petitioner's contentions are equally without foundation.

The order of the Civil Aeronautics Board is AFFIRMED.

EXHIBIT B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

A.V. COSTANTINI, d/b/a UNITED TRAVEL SERVICE, Petitioner, vs. CIVIL AERONAUTICS BOARD	No. 80-7754 Filed May 25, 1982 ORDER

Before: WALLACE AND PREGERSON, Circuit Judges, and BYRNE, District Judge*

The petition for rehearing is denied.

*Honorable William Matthew Byrne, Jr., United States District Judge for the Central District of California, sitting by designation.

APPENDIX C

Order 80-11-10

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 3rd day of November, 1980

Served Nov 5,1980

A.V. Costantini, d/b/a/ United Travel Service,et al.	Dockets 37917
v.	38211
Trans World Airlines, Inc., et al.,	38233

ORDER

This matter is before the Board on the motion of A.V. Costantini for review of the decision of the Director of the Bureau of Consumer Protection (Order 80-6-21) dismissing three third-party complaints. The complaints comprise the latest chapter in Costantini's longstanding claim that several certificated air carriers, the Air Traffic Conference

(ATC), and the International Air Transport Association (IATA) unlawfully frustrated his plans for continuation and nationwide expansion of his former travel agency business. In the first of the three complaints, Costantini alleged that Trans World Airlines (TWA) made false statements to ATC,IATA and the Board that the branch offices of Costantini's travel agency were being sold as franchises and were under a different ownership than the parent office. The remaining two complaints allege that ATC and IATA relied on the assertedly false statements as a basis for denying Costantini's applications for ATC andIATA accreditation of his branch offices, that they failed to advise Costantini that his applications for accreditation were being disapproved for that reason, and that ATC and IATA

thereby breached the terms of the Board approved ATC and IATA agreements requiring that the organizations give full notice of their reasons for disapproving an application for accreditation.

Costantini's motion to review the Director's dismissal order was filed on June 30, 1980. Answers have been filed by ATC and IATA. We have considered the motion for review and the responses thereto and have decided to take review; however, we will dismiss the complaints.

On review, Costantini charges that the Director concluded erroneously that the complaints involved a purely private dispute between Costantini and the respondents which should be resolved in other forums. He argues that the allegations raised are of concern to the Board and the public and therefore war-

rant institution of an enforcement proceeding. We conclude, however, that the Director's dismissal is justified regardless of whether or not the gravamen of the complaints can be considered as a purely private dispute.

In his dismissal order, The Director also concluded that it would not be in the public interest to "expend[] our scarce enforcement resources ***to pursue allegations about incidents allegedly occurring seven years ago***"(Order 80-6-21 at 2). We fully agree, and believe that this conclusion is dispositive of the complaints.

Our enforcement resources are limited, and we simply cannot conclude that the public interest would be served by an enforcement proceeding involving actions taken seven years ago under a regulatory framework which has changed substantially

since the alleged incidents occurred. Moreover, the accreditation procedures of ATA and IATA are presently under review in the ongoing investigation into the Competitive Marketing of air transportation in Docket 36595. Finally, our public interest conclusion is reinforced by the fact that Costantini has pursued his claims against the air carrier industry in federal district court and was unable to prove any of his allegations.1/

Accordingly,

1. We grant the Motion of A.V. Costantini for review of Order 80-6-21.

2. We dismiss the enforcement pro-

1/ See, A.V. Costantini v. Trans World Airlines, Inc. et al. No. C-80-0333-WWS; (N.D. Cal.,1980) dismissed on ground of res judicata; Costantini,et al. v. Air Transport Association of America, et al., No. C-74-0365-SAW (N.D. Cal,,1974); Costantini, et al. v. Air Transport Association of America,et al., No. C-75-2221-WHO (N.D. Cal., 1977) appeal dismissed No. 75-2221(9th Cir.,1978).

ceedings in Dockets 37917, 38211, and 38233.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

(SEAL)

All Members concurred.

APPENDIX D

Order 80-6-21

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.
Issued Under Delegated Authority
June 4, 1980

Served June 5, 1980

A.V. Costantini, d/b/a United Travel Service, et al.	Dockets
v.	37917,
Trans World Airlines, Inc., et al.	38211,
	38233

ORDER DISMISSING COMPLAINTS

Before us for consideration are three new third-party complaints of Mr. A.V. Costantini of Daly City, California. In them, he raises the now all too familiar assertion that the Air Traffic Conference (ATC), the International Air Transport Association (IATA), and one or more airlines, in this instance, Trans World Airlines, have unlawfully frustrated his plans for continuation and nation-wide expansion of his former travel agency

business. 1/Specifically, he asserts that the repondents prevented him from opening certain branch offices in Montgomery Ward Stores in 1973, allegedly in contravention of Section 411 of the Federal Aviation Act.

Where a third-party complaint alleges a violation of Section 411, there must be a showing that the public interest is affected; the Supreme Court has ruled that Section 411 cannot be employed to vindicate purely private ends. American Airlines, Inc.,Inc. v. North American Airlines, Inc., 351 U.S. 79 (1956); Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 301-304 (1976).

1/ Costantini's dispute with the certificated air carrier industry has been before the Board on repeated occasions since 1975, when ATC first placed Costantini's agency, United Travel Service, in default. See. e.g., Dockets 28116, 28250, 29716, 33349, 33700, 33917, 23909, 35144, 35940, 37917, 38211,and 38233; Orders 77-8-64 (August 16, 1977), 79-9-113(September 20,1979), 79-12-173(December 26, 1979), 80-3-118 (March 20, 1980), and 80-5-11 (May 1, 1980).

The allegations in these complaints, however, represent nothing more than a relentless continuation of Costantini's long-standing private dispute with the airline industry. The Board has made it clear that this dispute should be pursued in other forums--arbitration procedures or the courts. See Orders 77-8-64, 79-9-113, and 80-5-11. We see no reason to depart from this policy particularly on claims for which the complainant has already sought relief and lost in court.2/ Moreover, the public inter-

2/ Costantini's Montgomery Ward branch offices were the subject matter of an action for $94 million in actual and exemplary damages brought in Federal discourt shortly before the substantially identical allegations were made in his complaint for declaratory and injunctive relief from the Board, filed March 24, 1980 in Docket 37917. See A.V. Costantini d/b/a United Travel Service, d/b/a Ward's Travel Service v. Trans World Airlines, Inc. and Does I through XC, No. C-80-0333-WWS (N.D. Cal 1980). On April 16, 1980 (before Costantini filed his further complaints in Dockets 38211 and 38233), the court dismissed this case on grounds of

est would not be served by expending our scarce enforcement resources now to pursue allegations about incidents allegedly occurring seven years ago, especially in view of the major changes that have been made in the regulatory framework under which the Board operates and the fact that the branch office appointment procedures of ATC and IATA are under review in the on-going investigation into the competitive marketing of air transportation in Docket 36595.

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res judicata, finding that the matter had been disposed of in prior cases, namely, Costantini et al. v. Air Transport Association of America, et al., No. C-74-0365-SAW (N.D. Cal. 1974), and Costantini et al. v. Air Transport Association of America, et al., No. C-75-2221-WHO (N.D. Cal., judgment entered September 30, 1977), appeal dismissed, No. CV-75-2221 (9th Cir., 1978). See also, Trans World Airlines, Inc. v. United Travel Service, et al., No. 718-979 (Calif. Super.Ct., December 4, 1978) (Judgment entered for $205,185 plus costs). We note that Mr. Costantini also initiated arbitration proceedings on this matter in 1973, from which he voluntarily withdrew; see answer filed by Air Traffic Conference in Docket 33349.

Accordingly, by authority delegated under Rule 205 of the Board's Rules of Practice (14 C.F.R. 302.205), we dismiss these complaints.

Within 21 days after service of this order, the complainant may file a motion under Rule 205 to request review by the Board. If no such motion for review is filed within that period, this order will become final 30 days after the service date unless the Board takes review on its own initiative before then.

By Reuben B. Robertson

Director

Bureau of Consumer Protection

PHYLLIS
PHYLLIS T. KAYLOR
Secretary

APPENDIX E

5 U.S.C. Section 554(c)

(c) The agency shall give all interested parties opportunity for-

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title [5 USCS Sections 556 and 557].

APPENDIX F

49 U.S.C. Section 706(2)(D) and (F)

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(D) without observation of procedure required by law;

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

APPENDIX G

49 U.S.C. Section 1302(a)(3)

(a) General factors for consideration. In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(3) The availability of a variety of adequate, economic, efficient, and low-priced services by air carriers and foreign air carriers without unjust discriminations, undue preferences or advantages, or unfair or deceptive practices, the need to improve relations among, and coordinate transportation by, air carriers, and the need to encourage fair wages and equitable working conditions for air carriers.

APPENDIX H

49 U.S.C. Section 1472(e)

Failure to file reports; falsification of records. Any Air carrier, or any officer, agent, employee, or representative thereof, who shall knowingly and willfully, fail or refuse to make a report to the Board or Administrator [Secretary of Transportation] as required by this Act, or to keep or preserve accounts, records, and memoranda in the form and manner prescribed or approved by the Board or Administrator [Secretary of Transportation], or shall knowingly, and willfully, falsify, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully file any false report, record, or memorandum, shall be deemed guilty of a misdemeanor and, upon conviction thereof, be subject for each offense to a fine of not less than $100 and not more than $5,000.

APPENDIX I

49 U.S.C. Section 1482(a)

Filing of complaints; complaints against members of the Armed Forces. Any person may file with the Administrator [Secretary of Transportation] or the Board, as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provision of theis Act, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Administrator [Secretary of Transportation] or the Board to investigate the matters complained of. Whenever the Administeator [Secretary of Transportation] or the Board is of the opinion that any complaint does not state facts which warrent an investi-

gation or action, such complaint may be dismissed without hearing In the case of complaints against a member of the Armed Forces....(remainder of text not applicable)

APPENDIX J

49 U.S.C. Section 1485(e) and (f)

(e) Compliance with orders. It shall be the duty of every person subject to this Act, and its agents and employees, to observe and comply with any order, rule, regulation, or certificate issued by the Admiistrator [Secretary of Transportation] or the Board under this Act affecting such person so long as the same shall remain in effect.

(f) Findings of fact; service of orders. Every order of the Administrator [Secretary of Transportation] or the Board shall set forth the findings of fact upon which it it is based, and shall be served upon the parties to the proceeding and the persons affected by such order.

APPENDIX K

14 C.F.R. Section302.204(b)

Within fifteen (15) days after service of a third-party complaint, each person complained of shall file an answer in conformance with and subject to the requirements of Section 302.207(b). Extensions of time for filing an answer may be granted by the Director of the Bureau of Consumer Protection for good cause shown.

APPENDIX L

14 C.F.R. 302.207(b)

All answers shall conform to the requirements of Section 302.8(a)(2) and shall fully and completely advise the parties and the Board as to the nature of the defense and shall admit or deny specifically and in detail each allegation of the complaint unless the person complained of is without knowledge, in which case, his answer shall so state and the statement shall operate as a denial. Allegations of fact not denied or controverted shall be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered and shall, in the absence of a reply, be deemed to be contoverted.

APPENDIX M

14 C.F.R. Section 302.208

Failure of a respondent to file and serve an answer within the time and in the manner prescibed by this part shall be deemed to authorize the Board, in its discretion, to proceed to take proof, without notice, of the allegations or charges set forth in the complaint or order, provided that the Board or administrative law judge may permit late filings of an answer for good cause shown.

PROOF OF SERVICE

I, the undersigned, that I caused a true copy of the foregoing PETITION FOR WRIT OF CERTIORARI, to be mailed this date, first-class postage prepaid, to all persons required to be served, who are as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

William F. Baxter, Ass't Attorney General

Barry Grossman, Attorney

Susan J. Atkinson, Attorney

Civil Aeronautics Board
Washington, D.C. 20428

David M.Kirstein, General Counsel

Michael Schopf, Deputy General Counsel

Glen M. Bendixsen, Associate General Counsel,Litigation

J. Thomas Ezell, Attorney

I declare under penalty of perjury that the above is true and correct.

Executed at Daly City, California on August 20, 1982

A.V. Costantini

Office - Supreme Court, U.S.
FILED
SEP 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-316

In the Supreme Court of the United States

OCTOBER TERM, 1982

A.V. COSTANTINI, dba UNITED TRAVEL SERVICE, dba WARDS TRAVEL SERVICE, PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the Civil Aeronautics Board did not abuse its discretion in dismissing petitioner's complaints alleging violations of the Federal Aviation Act.

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v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. A-1 to A-4) is unpublished. See 679 F.2d 896. The opinion of the Civil Aeronautics Board (Order 80-11-10; Pet. App. C-1 to C-6) and the opinion of the Director of the Board's Bureau of Consumer Protection (Order 80-6-21; Pet. App. D-1 to D-5) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1982. A petition for rehearing was denied on May 25, 1982 (Pet. App. B-1). The petition for a writ of certiorari was filed on August 23, 1982. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 411 of the Federal Aviation Act, 49 U.S.C. 1381, provides:

> The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

STATEMENT

This action arises from three complaints that petitioner filed in May 1980 with the Civil Aeronautics Board under Section 411 of the Federal Aviation Act, 49 U.S.C. 1381. In his complaints, petitioner requested that the Board institute enforcement proceedings against Trans World Airlines (TWA) and against two airline trade associations, the Air Traffic Conference (ATC) and the International Air Transport Association (IATA). Petitioner contended that in 1973 TWA, ATC, and IATA unlawfully frustrated his plan for continuation and expansion of his former travel agency business. Specifically, he argued that TWA falsely had stated that petitioner was engaged in a franchise operation barred by ATC and IATA rules and that ATC and IATA had misrepresented the reasons for their refusal to accredit his branch offices. Petitioner previously had filed numerous complaints with the Board alleging interference with his

business by the air carrier industry and also had filed several federal district court actions as well as an arbitration proceeding. See Pet. App. D-2 n.1, D-3 to D-4 n.2.

The Director of the Bureau of Consumer Protection, acting under delegated authority, dismissed petitioner's complaints on the ground that the public interest would not be served by an investigation of the complaints (Pet. App. D-1 to D-5). The Director noted that petitioner's complaints represented merely a continuation of a long-standing private dispute, which the Board previously had indicated should be pursued through arbitration proceedings or the courts, and that petitioner had presented his claims in court and had lost. The Director also concluded (*id.* at D-3 to D-4) that:

> the public interest would not be served by expending our scarce enforcement resources now to pursue allegations about incidents allegedly occurring seven years ago, especially in view of the major changes that have been made in the regulatory framework under which the Board operates and the fact that the branch office appointment procedures of ATC and IATA are under review in the on-going investigation into the competitive marketing of air transportation in Docket 36595.

The Board affirmed the Director's dismissal of petitioner's complaints (Pet. App. C-1 to C-6). The Board concluded that, even if the complaints were not considered to involve a purely private dispute, dismissal was justified for the other reasons cited by the Director (*id.* at C-4 to C-5).

The court of appeals affirmed the Board's decision (Pet. App. A-1 to A-4). The court concluded that the Board did not abuse its discretion in dismissing the complaints, since it had based its public interest determination on appropriate criteria—(1) the essentially private nature of petitioner's disputes, (2) the fact that the disputes had been the subject

of several prior judicial and administrative proceedings that had proved to be fruitless, and (3) the existence of the Board's ongoing review of competitive marketing practices. The court rejected petitioner's contentions of Board errors, characterizing them as "without foundation" (*id.* at A-4).

ARGUMENT

The petition in this case raises matters that are entrusted by statute to the discretion of the Civil Aeronautics Board. The decision of the court of appeals upholding the Board's dismissal of petitioner's complaints is correct and does not conflict with any decision of this Court or any court of appeals. Therefore, it does not warrant review by this Court.

1. The court of appeals correctly concluded that the Board did not abuse its discretion in dismissing petitioner's complaints. Section 411 of the Federal Aviation Act, the statutory provision under which petitioner filed his complaints, states that the Board "may" initiate an investigation into alleged unfair or deceptive practices "if it considers that such action by it would be in the interest of the public." 49 U.S.C. 1381. It is well established that the Board must find that an investigation would be in the public interest in order to proceed under Section 411. See, *e.g.*, *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 302 (1976); *American Airlines, Inc.* v. *North American Airlines, Inc.*, 351 U.S. 79, 85 (1956); *Aloha Airlines, Inc.* v. *CAB*, 598 F.2d 250, 256 (D.C. Cir. 1979). The Board has no jurisdiction under Section 411 to "vindicate private rights." *American Airlines* v. *North American Airlines, Inc., supra*, 351 U.S. at 83. A court's duty in reviewing the Board's public interest determination is not to determine independently what constitutes the public interest, but rather to decide "whether, in determining what is the public interest, the Board has stayed within its jurisdiction and applied criteria appropriate to that determination." *Id.* at 85.

As the court of appeals found (Pet. App. A-3), the criteria applied by the Board in this case were "entirely appropriate" to the public interest determination. The criteria—the essentially private nature of the dispute, the existence of prior judicial and administrative proceedings relating to the same dispute that had been resolved against petitioner, the Board's limited enforcement resources, the fact that the incidents at issue had occurred seven years earlier under a different regulatory framework, and the existence of the Board's ongoing review of competitive marketing practices, including practices of ATC and IATA — all point to a lack of public interest in initiating a Board investigation. Petitioner has not disputed the court of appeals' conclusion that the criteria used by the Board were appropriate and has not presented any additional considerations that would justify overruling the Board's public interest determination. The court of appeals correctly concluded that the Board did not abuse its discretion in dismissing petitioner's complaints.[1]

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[1]See, *e.g.*, *REA Express, Inc.* v. *CAB*, 507 F.2d 42, 46 (2d Cir. 1974), noting that the Board should assume jurisdiction under Section 411 only in those cases in which injury to the public is substantial.

Petitioner argues (Pet. 19-20) that the Board and the court of appeals should not have focused on Section 411, since he alleges that his complaints are authorized under 49 U.S.C. 1482(a) as well. However, the latter section also gives the Board discretion to dismiss complaints for reasons of public interest other than failure to allege facts constituting a violation of the Federal Aviation Act. See *Flight Engineers' International Association* v. *CAB*, 332 F.2d 312, 314-315 (D.C. Cir. 1964). Reasons that may justify dismissal under 49 U.S.C. 1482(a) include availability of relief in another forum, such as a court. 332 F. 2d at 316-317. Cf. also, *e.g.*, *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958) (an administrative agency must have discretion "to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically").

2. Petitioner contends that the decisions below conflict with various established principles found in statutes or in decisions of this Court. None of these contentions is valid, and the court of appeals properly rejected them (Pet. App. A-3 to A-4). First, petitioner argues (Pet. 12) that the decisions below conflict with the principle that agency orders must be obeyed, citing 49 U.S.C. 1485(e) and *Atlantic Coast Line R.R.* v. *Florida*, 295 U.S. 301 (1935). This principle has no relevance here because the Board decided on public interest grounds not to investigate petitioner's allegations that agency orders had been violated. It is that exercise of the Board's discretion that is at issue here, not the merits of petitioner's complaints. Second, petitioner contends (Pet. 13-16) that the court of appeals failed to recognize that petitioner has a "right to administrative action" as a representative of the public interest, citing, *inter alia*, *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). There is no such right to administrative action in petitioner's case, since the statute requires that the Board (not petitioner) make the public interest finding that will justify initiation of an investigation. Neither *Sierra Club* nor the other authority cited by petitioner provides for any "right to administrative action" under Section 411 or any other section of the Federal Aviation Act. Moreover, as noted above, petitioner has not demonstrated that investigation of his complaint would be in the public interest. Third, petitioner argues (Pet. 16) that the court of appeals has decided an important question of federal law relating to the legality of TWA's alleged acts under 49 U.S.C. 1472(e). Neither the Board nor the court of appeals considered any such question or made any finding of fact concerning TWA's alleged acts. It would be inappropriate for this Court to address petitioner's argument at this stage. See, *e.g.*, *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 283 (1978) (Powell, J.).

Petitioner argues next (Pet. 17-18) that the decisions below conflict with the principle that agency action must conform to the agency's rules, citing *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), and other cases. There has been no violation of any agency rule in this case. Although petitioner claims that the Board's rules (14 C.F.R. 302.207(b) and 302.208) require it to accept and act on uncontroverted allegations of fact, the provisions cited by petitioner are for the administrative convenience of the Board. They do not require the Board to accept any uncontroverted allegation of fact made by a third party. Moreover, 14 C.F.R. 302.208 states on its face that the Board may proceed "in its discretion."

Petitioner next contends (Pet. 19-21) that the decisions below conflict with the principle that an evidentiary hearing is required, citing 49 U.S.C. 1482 and *Marshall* v. *Sawyer*, 365 F.2d 105, 111 (9th Cir. 1966), cert. denied, 385 U.S. 1006 (1967). But 49 U.S.C. 1482 requires the Board to investigate a complaint only when there is "reasonable ground" for such investigation; moreover, petitioner fails to quote the portion of that statute that provides that "[w]henever * * * the Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing." 49 U.S.C. 1482(a). See also page 5, note 1, *supra*. Moreover, an evidentiary hearing is intended to benefit the person accused, not the complainant. *Marshall* v. *Sawyer* is inapposite, because the Board never made a determination of adjudicatory facts in this case.[2]

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[2]Petitioner also cites 5 U.S.C. 554(c)(2) as authority for requiring an evidentiary hearing in this case. That section applies only to adjudications required by statute to be determined on the record after opportunity for a hearing. 5 U.S.C. 554(a). Here the statute at issue gives the

Petitioner argues (Pet. 21-22) that the decisions below conflict with the principle that an order issued without evidentiary support is beyond the power and jurisdiction of an agency, citing *FTC* v. *Raladam Co.*, 283 U.S. 643 (1931). Since the Board did not rule on the merits of petitioner's complaint, there was no need for it to consider his evidence except as it related to the public interest determination. Petitioner does not dispute that the Board had evidentiary support for its decision that an investigation of petitioner's complaint would not be in the public interest.

Petitioner contends finally (Pet. 22-23) that the court of appeals' decision conflicts with the principle that trial de novo is available when agency action is unwarranted by the facts, citing *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971). In *Overton Park* this Court noted that de novo review under 5 U.S.C. 706(2)(F) is authorized only when agency action is adjudicatory in nature and agency factfinding procedures are inadequate, or when issues not before the agency are raised in a proceeding to enforce nonadjudicatory agency action. 401 U.S. at 415. The second situation referred to in *Overton Park* is clearly inapplicable. The first also has no relevance, since there is no allegation that the Board erred in finding the facts that support its determination that investigation of petitioner's complaint would not be in the public interest.

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agency the discretion to determine on public interest grounds that no adjudication shall occur, and the Board exercised that discretion. Thus 5 U.S.C. 554(c)(2) has no application to this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

THOMAS L. RAY
Acting Associate General Counsel

MARK FRISBIE
Attorney
Civil Aeronautics Board

SEPTEMBER 1982

DOJ-1982-09